RECORD AND BRIEFS

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No. 16-341

IN THE

Supreme Court of the United States

TC HEARTLAND, LLC D/B/A HEARTLAND FOOD PRODUCTS GROUP,

Petitioner,

v.

KRAFT FOODS GROUP BRANDS LLC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

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Respondent argues that "*current*" statutory law, "not a *past* Federal Circuit decision," controls this case. Resp. Br. at 14 (emphases in original). We agree. As Petitioner's opening brief states: "The Court should decide this case based on currently in force statutory law and this Court's precedents that remain binding and not overruled." Pet. Br. at 21; *see also id.* at 13–14, 39–42.

The current text of 28 U.S.C. § 1400(b) is exactly the same today as it was when § 1400(b) was enacted in 1948, and as it was when this Court decided *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222 (1957). That text forms a structure that expressly distinguishes between (1) "the judicial district where the defendant resides," on the one hand, and (2) "where the defendant has committed acts of infringement and has a regular and established place of business," on the other.

It is undisputed that at the time of § 1400(b)'s enactment, its phrase, "where the defendant resides," denoted a defendant's "*domicile*." *Fourco*, 353 U.S. at 226 (emphasis in original). The concept of domicile refers to a specific, singular place. "[N]o person has more than one domicil at a time." Restatement (Second) of Conflict of Laws § 11 (1971).

Like the respondent in *Fourco*, Respondent here asserts that the original meaning of § 1400(b) should be abandoned in favor of an artificial meaning of "reside" borrowed from 28 U.S.C. § 1391(c). To accept Respondent's argument would be to make nonsense of § 1400(b)'s express distinction between resident and non-resident defendants and, for a large class of defendants, to destroy the protection that § 1400(b) and predecessor statutes have extended since 1897.

But the more overwhelming defect in Respondent's argument is that the current version of § 1391 provides in subsection (a): "APPLICABILITY OF SECTION.—Except as otherwise provided by law—(1) this section shall govern the venue of all civil actions brought in district courts of the United States."

28 U.S.C. § 1391(a)(1). This exception qualifies the entirety of § 1391 and encompasses the special two-part structure of § 1400(b), which "otherwise provide[s]" for venue in patent infringement actions. *See* Pet. Br. at 13–14, 39–40. To decide this case, the Court need merely give the exception provision of § 1391(a)(1) its plain meaning.

The exception provision in current § 1391(a)(1) presents an obvious textual difficulty for Respondent, but its attempt to address that difficulty comes only in two paragraphs on pages 31–32 of its brief. Respondent asserts that "the '[e]xcept' language in Section 1391(a) has nothing to do with the definitions in Section 1391(c)" because "[t]hose definitions do not 'govern . . . venue.'" Resp. Br. at 32. But laying aside that § 1391(c) prescribes legal fictions ("deemed to reside"), not "definitions," Respondent's own brief asserts that "Section 1391(c) now governs '[f]or all venue purposes.'" Resp. Br. at 8.

That is to say, Respondent argues that § 1391(c) "governs '[f]or all venue purposes'" but its "definitions do not 'govern . . . venue.'" Resp. Br. 8, 32. The Court should reject this self-contradictory argument, reaffirm this Court's well-established construction of § 1400(b), and reverse with directions that venue of this action is improper in the District of Delaware.

I. THE TEXT AND STRUCTURE OF § 1400(b)

28 U.S.C. § 1400(b) provides:

> Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.

Section 1400(b)'s text expressly distinguishes between (1) "the judicial district where the defendant resides," on the one hand, and (2) "where the defend-

ant has committed acts of infringement and has a regular and established place of business," on the other. Those two provisions describe two different venues, and the meaning of each provision is informed by its "companion provision." *Life Techs. Corp. v. Promega Corp.*, 137 S. Ct. 734, 741 (2017).

A. The Undisputed Original Meaning of § 1400(b)

Respondent does not dispute that at the time of its enactment, the § 1400(b) phrase, "the judicial district where the defendant resides," denoted the judicial district where a defendant's "*domicile*" was located, *Fourco*, 353 U.S. at 226 (emphasis in original), and was "synonymous" with the district "of which the defendant is an inhabitant" found in § 1400(b)'s immediate predecessor statute, *id.* at 225–26 (quoting Judicial Code of 1911, ch. 231, § 48, 36 Stat. 1087, 1100). The word "inhabitant" is narrower than "citizen" and denotes a location *within* a state. *See Shaw v. Quincy Mining Co.*, 145 U.S. 444, 447 (1892); *Galveston, Harrisburg & San Antonio Ry. Co. v. Gonzalez*, 151 U.S. 496, 504–06 (1894).

Respondent also does not dispute that at the time of its enactment, the § 1400(b) phrase, "where the defendant has committed acts of infringement and has a regular and established place of business," denoted venues where *non-resident* defendants were subject to suit for alleged patent infringement. If the terms of the second clause of § 1400(b) are satisfied, venue is proper regardless of whether a defendant "resides" in the forum district or not. This point is reinforced by 28 U.S.C. § 1694, which was enacted in conjunction with § 1400(b) and authorizes service of originating process "[i]n a patent infringement action commenced in a district where the defendant is *not a resident* but has a regular and established place of business" (emphasis added).

Respondent also does not dispute that § 1400(b) applies, by its terms, to all *types* of natural and juris-

tic person defendants. This fact was, indeed, one basis on which *Fourco* held that § 1400(b) is "complete, independent and alone controlling in its sphere" and "is not to be supplemented by the provisions of 28 U.S.C. § 1391(c)." 353 U.S. at 228, 229; *see id.* at 228 ("We think it is clear that § 1391(c) is a general corporation venue statute, whereas § 1400(b) is a special venue statute applicable, specifically, to *all* defendants in a particular type of actions, *i.e.*, patent infringement actions." (emphasis in original)).

Section 1400(b)'s comprehensive nature is confirmed by its immediate predecessor, which expressly stated that it applied to any "defendant, *whether a person, partnership, or corporation.*" Pet. Br. at 4–5 (quoting Judicial Code of 1911 § 48, 36 Stat. at 1100) (emphasis added). And *Fourco* held that the 1948 codification of § 1400(b) "made no substantive change from" its immediate predecessor. 353 U.S. at 228. *Cf. Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) ("*stare decisis* carries enhanced force when a decision . . . interprets a statute").

When given its original meaning, § 1400(b) prescribes a straightforward, easily-administered, two-part test for whether a judicial district is a proper venue for a patent infringement action. The facts of this case are illustrative.

Petitioner is a limited liability company ("LLC") organized and existing under the laws of Indiana. Under Indiana law, a limited liability company is "a distinct legal entity," *Troutwine Estates Dev. Co. v. Comsub Design & Eng'g, Inc.*, 854 N.E.2d 890, 898 (Ind. Ct. App. 2006), and exists pursuant to its articles of organization which prescribe, among other things, the location of Petitioner's registered office in Indiana, *see* IND. CODE §§ 23-18-2-4, 23-18-2-10(a). Petitioner has no offices, employees, or operations in Delaware. JA22a–23a.

Under the original meaning of § 1400(b), this is an easy case. The District of Delaware is not "the judicial district where the defendant resides" under § 1400(b)'s original meaning, because Petitioner is an Indiana LLC and its domicile is in the Southern District of Indiana. And Petitioner has no place of business in Delaware, thus rendering the second clause of § 1400(b) inapplicable.

B. Interpreting § 1400(b) to Have Its Original Meaning, as *Fourco* Did, Does Not Yield the Practical Problems Asserted by Respondent.

Respondent asserts that adherence to *Fourco*'s interpretation of § 1400(b)—that is, giving the statute its original meaning—would result in practical problems that a revisionist interpretation of the statute would obviate. Not so.

1. Alien Defendants

Respondent argues that continued adherence to *Fourco*'s interpretation of § 1400(b) would "overturn" *Brunette Machine Works, Ltd. v. Kockum Industries, Inc.*, 406 U.S. 706 (1972), and make "patent-infringement suits against many foreign defendants . . . *literally impossible*." Resp. Br. at 13, 23–24 (emphasis in original). Nothing of the sort is true.

Respondent's argument is based on a mischaracterization of *Brunette*'s holding. *Brunette* holds that the venue protection prescribed in § 1400(b) does not extend to alien defendants. 406 U.S. at 713–14. Thus, after *Brunette*, alien defendants in patent infringement actions have always had to look outside of § 1400(b) for any possible venue protection. That remains true today, and will remain true if the Court adheres to *Fourco*'s interpretation of § 1400(b).

Prior to 2011, alien defendants would look in vain for any venue provision that would limit where they were subject to suit for alleged patent infringement. Today some alien defendants may have a venue de-

fense under current § 1391(c) that did not exist at the time *Brunette* was decided, albeit only in the rarest of cases.[1] But neither before nor after 2011 does any subsection of § 1391 supplement § 1400(b). Rather, as this Court held in *Brunette*, alien defendants are simply outside the scope of § 1400(b).

2. "Unincorporated" Defendants

Respondent insinuates that adherence to *Fourco*'s interpretation of § 1400(b) would purportedly leave "courts struggling to ascertain the residence of an individual, an unincorporated business, or a corporate plaintiff." Resp. Br. at 1. To the contrary, by referring to a defendant's domicile, § 1400(b) obviates the "struggling" Respondent refers to.

"'Domicile' is, of course, a concept widely used in both federal and state courts for jurisdiction and conflict-of-laws purposes, and its meaning is generally uncontroverted." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989). The "domicile" of an individual is generally determined by reference to a physical presence in a place with a certain intent to remain there. *Id.* The domicile of a juristic person, such as a corporation or other artificial entity organized under state law, is generally determined by reference to the person's state charter. *See, e.g., Fairbanks Steam Shovel Co. v. Wills*, 240 U.S. 642, 647–48 (1916).

Even in the unusual case of an action against an association-in-fact having no legal existence or personhood, the rule has long been clear. In *Sperry Products, Inc. v. Association of American Railroads*,

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[1] The issue would seem to arise only where the defendant is (i) a natural person, (ii) domiciled in the United States, and (iii) sued outside the district of domicile.

132 F.2d 408 (2d Cir. 1942), Judge Learned Hand established that the domicile or inhabitancy of such a non-person for purposes of patent venue was fixed in a single place—where the association maintained its principal place of business. *Id.* at 411–12.

Contrary to Respondent's suggestion (Resp. Br. at 13, 27–31), the case of *Denver & Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556 (1967), has no application to patent infringement actions. At issue in *Denver & Rio Grande* was the scope of the general venue statute § 1391(c) which, under *Fourco*, does not apply to patent infringement actions.[2]

Thus, even after *Denver & Rio Grande*, *Sperry*'s rule fixing residence in only one place continued to control patent venue without any hint of controversy. *See* 15 Charles A. Wright et al., *Federal Practice and Procedure* § 3823, at 142 & n.41 (1st ed. 1976) (citing *Sperry* as the controlling law for determining the residence of an association for patent venue, and citing no contrary authority on the point). The decades of *Sperry*'s acceptance refute Respondent's assertion that the rule is "unworkable." Resp. Br. at 30. Respondent's brief cites not a single example from this period of the "problems" (Resp. Br. at 27) it asserts

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[2] Indeed, *Denver & Rio Grande* relied on *Sperry* for the principle of "analogizing incorporated and unincorporated entities." 387 U.S. at 561. The Court noted that *Sperry* had recognized that the patent venue statute required "a single residence," *id.* at 560, and thus had fixed the unincorporated association's residence in one place. Section 1391(c), in contrast, then as now provided that multiple districts would be deemed or regarded as a corporate defendant's residence for venue purposes. *Denver & Rio Grande* considered whether a labor union should be treated similarly to corporations under § 1391(c).

adherence to *Fourco*'s interpretation of § 1400(b) would purportedly yield.

C. Interpreting § 1400(b) as Having Its Original Meaning, as *Fourco* Did, Is Reinforced by the Canon Disfavoring Implied Repeals.

As a cure for the illusory problems that would supposedly attend adhering to the original meaning of § 1400(b), Respondent seeks a cure—a new interpretation of § 1400(b) that would negate the protections it affords to almost all defendants—that is essentially legislative in nature. "Courts should not render statutes nugatory through construction." *United States v. Tohono O'odham Nation*, 563 U.S. 307, 315 (2011).

Respondent suggests its position will help "to clarify venue law," and then later in its brief, argues that any patent forum-shopping concerns can be addressed through litigation over personal jurisdiction. Resp. Br. at 19, 55. To adopt Respondent's suggested revisionist interpretation of § 1400(b) would be to destroy, for almost all patent defendants (*i.e.*, all juristic person defendants), the venue protection that § 1400(b) and predecessor statutes have extended since 1897, and to foment complex constitutional litigation in thousands of different factual scenarios.

Section 1400(b) and its companion service of process provision, 28 U.S.C. § 1694, were designed by Congress "to define the exact jurisdiction of the federal courts in actions to enforce patent rights." *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 565 (1942). Respondent does not deny that its proposed construction of § 1400(b) would permit non-resident defendants to be sued for alleged patent infringement in venues where they lack any regular and established place of business, in direct contradiction of § 1400(b)'s plain meaning. But Respondent asserts that this outcome is tolerated by the canon disfavoring surplusage because, under Respondent's pro-

posed construction, § 1400(b) might still have some application to natural person defendants. Resp. Br. at 34.

The canon disfavoring surplusage does not salvage Respondent's position. That canon applies in determining the meaning of a particular statute, *see Clark v. Rameker*, 134 S. Ct. 2242, 2248 (2014) (applying the canon to reject an interpretation that would "write out of the statute" certain elements in that statute), whereas the implied repeal canon applies where, as here, a court is trying to determine whether a "later statute" undermines in whole or in part an earlier statute. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153–54 (1976) (applying the canon to prevent a "*pro tanto*" or partial repeal).

Radzanower also directly refutes Respondent's argument that the implied repeal canon has no application where the later statute is merely removing a "judicial gloss." Resp. Br. at 45 (citation omitted). *Radzanower* is highly similar to this case not only because that case concerned whether a nineteenth century venue statute addressing "a narrow, precise, and specific subject" should be interpreted as "submerged" by a "generalized" venue statute enacted decades later, 426 U.S. at 153–54; but also because the implied repeal issue in that case arose due to this Court's prior interpretations of the older venue statute as "mandatory and exclusive" for a particular class of cases. *Id.* at 152.

Arguing the implied repeal canon is inapplicable to judicial glosses, Respondent misreads *Ex parte Collett*, 337 U.S. 55 (1949). The Court there reasoned that an earlier statute addressed "the proper forum" in which to bring an action, whereas the latter statute dealt "with the right to transfer an action properly brought." *Id.* at 60. The Court then noted that those issues—"venue" and "transfer"—are "two separate and distinct problems," *id.* at 60 & n.10, and

on that basis, the Court concluded that the later statute "does not repeal" the earlier. *Id.* at 60.

The standard for implied repeal is demanding, *see Radzanower*, 426 U.S. at 154, and Respondent does not claim that that standard is met here. Under *Radzanower*, the current version of § 1391 is not rightly or reasonably interpreted as negating venue protections that § 1400(b) and predecessor statutes have extended for more than a century. Here again, "*stare decisis* carries enhanced force when a decision . . . interprets a statute." *Kimble*, 135 S. Ct. at 2409; *see also Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 468 (1982) (applying *Radzanower* to disfavor "implied partial repeal").

Respondent's proposed interpretation of § 1400(b) is not saved but, to the contrary, is further undermined by Respondent's argument that § 1400(b) would still, under its construction, have some force with respect to *natural person* defendants. Resp. Br. at 34. Respondent's position is that § 1400(b) purportedly now *discriminates* among different types of defendants—a position directly contradicting *Fourco*'s teaching that § 1400(b) applies "to *all* defendants in a particular type of actions, *i.e.*, patent infringement actions." 353 U.S. at 228 (emphasis in original).

II. CURRENT § 1391 DOES NOT DESTROY THE VENUE PROTECTIONS OF § 1400(b).

Respondent's position also requires embracing incoherent or incorrect interpretations of § 1391(a)(1) and § 1391(c). By contrast, Petitioner's position makes sense of these provisions.

A. Section 1391(a)(1) Preserves § 1400(b) and Its Authoritative Construction by This Court.

This brief's introduction already explained the incoherence of Respondent's position that the exceptions clause has no application to subsection (c) be-

cause, even though "Section 1391(c) now governs '[f]or all venue purposes," § 1391(c)'s "definitions do not 'govern . . . venue.'" Resp. Br. at 8, 32. In contrast, Petitioner's interpretation makes sense of the text, structure, and history of the statute.

Unlike Respondent's unfathomable construction of the word "govern" in § 1391(c), Petitioner's interpretation of the text is straightforward. The word "govern" ordinarily means "to control, direct, or strongly influence the actions and conduct of," "determine, guide, regulate," and "to constitute a rule or law for: serve as a precedent or deciding principle for." *Webster's Third New Int'l Dictionary* (2017) (entry for "govern"). Any of those definitions leads to the common-sense result that § 1391(c) is a part of the statute that governs (i.e., controls, exerts influence over, or serves as a deciding principle for) venue.

As for statutory structure, subsection (c) is in § 1391, and the exception provision in § 1391(a)(1) applies to the whole "section."

Petitioner's interpretation is also consistent with the history of § 1391. At the time *Fourco* was decided, 28 U.S.C. § 1391 lacked any express exceptions clause similar to current § 1391(a)(1), and broadly provided that certain judicial districts "*shall be regarded* as the residence of such corporation *for venue purposes*." 28 U.S.C. § 1391(c) (1952) (emphasis added) (reproduced in Pet. App. 58a). The § 1391(c) language that *Fourco* considered ("for venue purposes") is not meaningfully different from the current § 1391(c) preamble ("[f]or all venue purposes").

Indeed, the breadth of the prior language in § 1391(c) is confirmed by *Pure Oil Co. v. Suarez*, 384 U.S. 202 (1966), which interpreted § 1391(c) as "appl[ying] to *all venue statutes* using residence as a criterion, at least in the absence of contrary restrictive indications in any such statute." *Id.* at 204–05

(emphasis added). The Court specifically cited *Fourco* as an example where such "contrary restrictive indications" were in the statute, *id.* at 206–07, but the Court nonetheless applied the then-existing version of § 1391(c) to define a company's residence for purposes of the Jones Act, 46 U.S.C. § 688 (1964).

Thus, the history of § 1391(c) is that the statute has long applied to "all venue statutes," *but with exceptions*. That approach is precisely the approach evident in the text and structure of current § 1391—covering "all" venue in (c) but with exceptions permitted under (a)(1). It is also a common and sensible approach for a generally applicable statute. Thus, for example, the Administrative Procedure Act provides a "general" right of judicial review with an exception where another "statute 'preclude[s] judicial review.'" *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984). And such an exception can be triggered where the application of the general rule "would severely disrupt th[e] complex and delicate" provisions of another statute. *Id.* at 348.

Finally, Respondent does not defend the Federal Circuit's suggestion (Pet. App. 5a–7a) that this Court's precedent interpreting § 1400(b) is not "law" within the meaning of § 1391(a)(1). "The term law in our jurisprudence usually includes the rules of court decisions as well as legislative acts." *Warren v. United States*, 340 U.S. 523, 526 (1951); *see also Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972). Congress clearly knows how to exclude case law precedent from statutory exceptions. *Cf.* 28 U.S.C. § 1367(a) ("Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal *statute* . . . ." (emphasis added)).

The term "law" in § 1391(a)(1) is easily broad enough to encompass judicial decisions construing the meaning of statutes. *Fourco* held that § 1400(b) was "complete, independent and alone controlling in its sphere," 353 U.S. at 228, and "is not to be sup-

plemented by the provisions of 28 U.S.C. § 1391(c)." *Id.* at 229. That interpretation prescribes the meaning of § 1400(b)'s text and thus is an integral part of the venue "law" that § 1391(a)(1) excepts from the operation of § 1391.

B. The Phrase "All Venue Purposes" Does Not Make Current § 1391(c) Apply More Broadly Than in *Fourco*.

Respondent relies heavily on the presence of the world "all" in current § 1391(c) and interprets that single word as mandating a rigid rule admitting of absolutely no exceptions. Yet even the version of § 1391(c) in force at the time of *Fourco* was interpreted by this Court's *Pure Oil* decision to apply to "all" venue statutes (with exceptions). 384 U.S. at 204-05. History provides additional reasons for rejecting the Respondent's interpretation.

After its amendment in 1988, the text of § 1391(c) facially *restricted* the subsection so that it applied only "[f]or purposes of venue *under this chapter*." 28 U.S.C. § 1391(c) (1988) (emphasis added). That restrictive language raised the possibility that *Pure Oil*—which applied § 1391(c) to a statute well outside the venue chapter of title 28—was no longer good law. Such a result, one leading commentator bemoaned, would be not only an "undesirable" result but also something that "Congress could not possibly have intended when it amended Section 1391(c) in 1988." 17 James Wm. Moore et al., *Moore's Federal Practice* § 110.03[4][b], at 110-38 (3rd ed. Supp. 2008).

Although no lower court appears to have ever relied on the 1988 amendment's restrictive language to

constrain the application of § 1391(c) definitions,[3] the American Law Institute's Federal Judicial Code Revision Project, which was approved May 17, 2001, viewed the language "[f]or purposes of venue under this chapter" as an "unfortunate prefatory phrase." Am. Law Inst., *Federal Judicial Code Revision Project* 189 (2004) (the "ALI Project"). The ALI Project therefore proposed adding "the introductory phrase . . . '[f]or all venue purposes'" as a means of "resolv[ing] the problem created [by] the 1988 amendment." *Id.*

Thus, the word "all" was suggested by the ALI Project to resolve a specific problem, and that word, coupled with the exceptions clause in (a)(1), restructured the statutory text language to be precisely as *Pure Oil* had interpreted the section decades earlier—applying to "all" venue statutes but with exceptions for statutes like § 1400(b).

The ALI Project also describes the new prefatory phrase as applying "globally," *id.* at 188, a word Re-

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[3] *See McCracken v. Auto. Club of S. Cal.*, 891 F. Supp. 559, 562 (D. Kan. 1995) (collecting authorities demonstrating that, although "the introductory phrase 'For purposes of venue under this chapter' . . . arguably limits the applicability of [§ 1391(c)], the practice of supplementing special venue statutes with § 1391(c) continues"); *see also* 17 James Wm. Moore et al., *Moore's Federal Practice* § 110.03[4][b], at 110-37 (3rd ed. Supp. 2008) (recommending that courts "should" apply the 1988 version of § 1391(c) to statutes outside of the venue chapter of title 28). It is ironic that the only lower court to give the restrictive language of the 1988 amendment any operative force was the Federal Circuit in *VE Holding*, but it relied on the restrictive language to *expand* the application of § 1391(c).

spondent quotes repeatedly. *See, e.g.*, Resp. Br. at 18, 21, 42, 47. But the word "globally" does not appear in the statute. The ALI Project also never hinted that § 1391(a)(1)'s exceptions clause was inapplicable to subsection (c).

Furthermore, the ALI Project was simultaneously and vigorously urging Congress to repeal § 1400(b), describing the statute as a "cancer" and "pernicious." *Id.* at 212, 214. The ALI's recommendation came in 2001, but a decade later, Congress rejected the recommendation. The ALI Project thus highlights what Congress did *not* do. Perhaps the congressional rejection of the ALI's recommendation was because times had changed: By 2011, the ill effects of expansive patent venue were already being experienced due to the Federal Circuit's erroneous decision in *VE Holding*. Or perhaps the Congress had other reasons. In any event, the views of the ALI Project are—to put it mildly—a fundamentally unreliable source for discerning the appropriate relationship between current §§ 1391 and 1400(b).

Finally, Respondent's simplistic all-means-all-without-exceptions construction of § 1391(c) does not even account for the very next provision in the statute. Current § 1391(d) provides a definition of corporate residence different from, and narrower than, the definition provided in subsection (c)(2). Section 1391(d) can be reconciled with subsection (c) only by accepting that the word "all" in § 1391(c) does not preclude exceptions.

III. RESPONDENT'S POSITION HAS MANY ADDITIONAL WEAKNESSES.

Respondent's position has many other weaknesses, and its amici's arguments do not bolster its case.

A. Respondent Cannot Reconcile Its Position With the Existence of the ATM Provision in AIA § 18(c).

Respondent relegates its discussion of § 18(c) of the Leahy-Smith America Invents Act ("AIA") to a single footnote but is unable to reconcile its position with the existence of that statute.

Respondent describes § 18(c) as "an uncodified provision of patent law." Resp. Br. at 36 n.18. Yet a statute is a statute whether codified or not, and Respondent cites no authority that uncodified statutes have less weight.

Respondent also notes that § 18(c) was enacted before (about three months before) the 2011 Amendment to § 1391, but Respondent errs in arguing that the earlier statute cannot be used in determining what "the later statute means." Resp. Br. at 37 n.18. The canon against implied repeals is precisely designed to assist courts in reaching the correct interpretation of "the later of the two statutes," with the courts avoiding interpretations that would render the "new statute . . . as wholly or even partially amending a prior one." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974) (citation omitted).

Here, there can be no doubt that Respondent's interpretation renders § 18(c) partially and perhaps even completely inoperative because Respondent's position renders "the second part of Section 1400(b) unused in most cases," except "in suits against individual defendants." Resp. Br. at 34. Yet that "second part of Section 1400(b)—i.e., the part providing venue in districts "where the defendant has committed acts of infringement and has a regular and established place of business"—is precisely the part that § 18(c) amends.

Under Respondent's position, Congress decided in September of 2011 to restrict patent venue by ex-

cluding ATMs from being considered regular and established places of business under § 1400(b), but then three months later, the very same Congress *impliedly* repealed that protection for almost every patent infringement defendant (save for natural persons personally owning ATM machines). Respondent's interpretation of the 2011 amendment—in addition to being based on a highly implausible sequence of events—clearly triggers the canon against implied repeals and should be disfavored.

By contrast, Petitioner's interpretation of the 2011 Amendment is not disfavored by the implied repeal canon because, under that interpretation, the 2011 Amendment did not affect AIA § 18(c) at all. The House Report on the 2011 Amendment was issued seven months prior to the passage of AIA § 18(c), and that report already omitted the ALI's proposal to repeal § 1400(b). *See* H.R. REP. NO. 112-10 (2011). Thus, when AIA § 18(c) was being enacted, members of Congress would have expected that § 1400(b) would remain good law, so the slight adjustment to § 1400(b)'s scope was sensible.

B. Congress Clearly Wrote a Special Venue Rule for Patent Litigation.

Some of Respondent's amici assert that "[i]n general matters of litigation, such as procedural rules, there is typically no reason to treat patent law differently from other areas of law." Br. of 22 Law, Economics and Business Professors in Support of Respondent at 14. That broad generalization does not withstand even the slightest scrutiny.

First, the statute at issue here was originally enacted by Congress in 1897 and was only two sentences long. It was entirely a special statute just for patent law governing two matters of litigation procedure: venue (now § 1400(b)) and service of process (now § 1694). In 2011, Congress also had a recommendation to repeal § 1400(b), and it declined. The

courts should not second-guess those congressional choices.

Second, several federal district courts have promulgated special local rules applicable only to patent cases. *See, e.g.*, E.D. Tex. Pat. Rules, http://www.txed.uscourts.gov/d/1179; N.D. Cal. Pat. Rules, http://www.cand.uscourts.gov/localrules/patent. The existence of these special local patent rules underscores Petitioner's point that patent infringement "is a tort that differs in important respects from other torts that federal courts are called upon to remedy." Pet. Br. at 33. Respondent's brief does not dispute this point.

Third, the patent field is home to one of the largest exceptions to the ordinary rules of litigation—the nationwide exclusive jurisdiction of the Federal Circuit. 28 U.S.C. § 1295(a)(1).

C. Respondent's and Its Amici's Policy Arguments Are Misdirected and Unpersuasive.

Respondent and its amici advance a number of institutional and policy reasons for affirming the decision below, none of which are persuasive or justify this Court overruling *Fourco* and holding, for the first time, that § 1400(b) means something wildly different than it meant when the statute was enacted and when this Court construed it in *Fourco*.

Respondent asserts that § 1400(b), as construed in *Fourco*, is "Unduly Restrictive" of "where patent owners can sue." Resp. Br. at 49, 50, 54. This is but an unvarnished reprise of the ALI Project's rejected call for § 1400(b)'s repeal.[4] Respondent's argument

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[4] The ALI Project reporter appears to have been influenced by an ABA "Section" policy position. *See* John B. Oakley, *Prospec-*

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does not cite a single real world example (*see* Resp. Br. at 50–51), and flies in the face of the 1897–1990 period, during which the nation's output of new technologies was unrivaled in the world and domestic corporate defendants were not subjected to the types of patent lawsuit abuses that amici supporting Petitioner describe. At all events, whether the provisions of § 1400(b)'s provisions are, or are not, "Unduly Restrictive" is irrelevant to the correct decision of the Question Presented in this case.

Respondent asserts that enforcing § 1400(b) according to its terms would purportedly "Make Patent Litigation More Burdensome, Not Less." Resp. Br. at 49, 51–52. This argument appears to be a euphemistic way of describing certain district courts' recent willingness to stretch Federal Rule of Civil Procedure 20(a)[5] to permit the joinder of unrelated de-

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tus for the American Law Institute's Federal Judicial Code Revision Project, 31 U.C. DAVIS L. REV. 855, 966 (1998) ("Significantly, the American Bar Association's Intellectual Property Section has called for subsection 1400(b)'s repeal in favor of having patent actions fall under the general venue statute."). As set forth in the Petition (Pet. at 16–17) and in the amicus curiae brief that the full ABA has submitted in support of Petitioner in this case, on August 8, 2016, the ABA House of Delegates adopted a resolution that "supports an interpretation of the special patent venue statute, 28 U.S.C. § 1400(b), that does not adopt the definition of 'resides' in the separate, general venue statute, 28 U.S.C. § 1391(c), to ascertain the meaning of 'resides' in § 1400(b)."

[5] *Compare Pergo, Inc. v. Alloc, Inc.*, 262 F. Supp. 2d 122, 127 (S.D.N.Y. 2003) (Koeltl, J.) (holding that Rule 20(a) does not permit joinder of unrelated defendants, selling independently

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fendants, selling independently developed products, in a single action for alleged patent infringement. Such joinder has the practical effect of denying defendants access to the same amount of pretrial and trial resources as plaintiffs expect and receive for their own claims, and making it impossible for a defendant to tell its own story in court, free of the distraction and confusion of co-defendants telling different, and potentially conflicting, stories. If enforcing § 1400(b) according to its original meaning, as *Fourco* interpreted it, limits patent plaintiffs' opportunities to coerce defendants in this fashion, that is no "burden" beyond what Rule 20(a) was historically understood to impose.

Respondent asserts that enforcing § 1400(b)'s existing provisions, as construed in *Fourco*, "would not disperse patent-infringement cases throughout the country" but purportedly "would merely re-shuffle the ranking of the most common forums." Resp. Br. at 54. Besides being wholly speculative and irrelevant to the Question Presented, Respondent's speculation as to future behaviors of patent litigants overlooks that *this case* involves an *Indiana* defendant seeking transfer to the Southern District of Indiana, where the accused products were designed and are manufactured. *See* JA24a–25a.

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developed products, in a single patent infringement action), *with MyMail, Ltd. v. Am. Online, Inc.*, 223 F.R.D. 455, 457 & n.2 (E.D. Tex. 2004) (Davis, J.) (rejecting *Pergo* and holding that Rule 20(a) permits joinder of unrelated defendants, selling independently developed products, in a single patent infringement action).

Not only are Petitioner's relevant activities overwhelmingly concentrated in Indiana, but the enforceability of the one remaining patent-in-suit turns importantly on the conduct, knowledge, and intent of actors who work and reside in the general vicinity of Respondent's headquarters location in Northfield, Illinois. *See* JA63a–92a. Petitioner's rights under § 1400(b) are not rightly denigrated based on academic speculation that restoration of § 1400(b) might not result in an *immediate* shift in where patent infringement actions may be brought.

Respondent asserts that enforcing § 1400(b)'s existing provisions, as construed in *Fourco*, is unnecessary and unwise because motions for transfer of venue under 28 U.S.C. § 1404(a) purportedly provide a superior way to direct patent infringement suits. Resp. Br. at 56–57. The contention is insupportable. The venue protection that § 1400(b) provides is a matter of right; it is enforceable by means of a straightforward, inexpensive, two-part test as described in Part I, *supra*; and its non-enforcement is subject to interlocutory appellate review. *Cf. Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568 (2013) (reviewing refusal to enforce forum selection clause). In contrast, transfer of venue under 28 U.S.C. § 1404(a) is not a matter of right; its resolution is highly complex and fact bound; and discretionary decisions on venue transfer motions are all but unreviewable by way of writ of mandamus.

Respondent's final argument is headed: "Congress Is Better Situated To Reform Patent Venue Appropriately." Resp. Br. at 57. The question here, however, is not whether this Court should "reform patent venue," but whether § 1400(b) continues to have its original meaning as previously and authoritatively construed by this Court. The answer to that question is "yes," and can come only from this Court.

CONCLUSION

For the reasons set forth above, the decision below should be reversed with directions that venue of this action was improperly laid in the District of Delaware.

Respectfully submitted,

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